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NATIONAL ENERGY BOARD REASONS FOR DECISION

In The Matter of the Application for Review
Under Section 17 of the National Energy Board Act

of

Newfoundland and Labrador Hydro

June 1984

NATIONAL ENERGY BOARD

REASONS FOR DECISION

IN THE MATTER OF an Application by Newfoundland and Labrador Hydro pursuant to section 17 of the National Energy Board Act for a review of the Decision dated January 1984 in respect of an Application by Hydro Quebec for licences to export electric power and energy to the State of New York.

CONSIDERED BY the Board in Ottawa, Ontario at its meeting of 28 May 1984 and 11 June 1984.



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BACKGROUND

In September, October and November 1983 the National Energy Board ("the Board") held a public hearing to consider the 1 December 1982 application by Hydro-Québec, pursuant to Part VI of the National Energy Board Act ("the Act"), for licences to export power and energy to the State of New York (Board Order No. LH-1-83). In Reasons for Decision issued in January 1984, the Board, having satisfied itself that the power and energy to be exported was surplus to reasonably foreseeable Canadian requirements, that the prices to be charged were just and reasonable in relation to the public interest, and having had regard to all other considerations that appeared to it to be relevant, indicated that it was prepared to issue six licences to Hydro-Québec. Licences EL-151, EL-152, EL-153, EL-154, EL-155 and EL-156 were issued by the Board on 17 January 1984 and approved by the Governor in Council by Order P.C. 1984-1130 dated 5 April 1984.

APPLICATION FOR REVIEW

On 5 April 1984, Newfoundland and Labrador Hydro ("NLH") applied, pursuant to section 17 of the Act and section 24 of the National Energy Board Rules of Practice and Procedure ("the Rules"), for a review of the Board's January 1984 decision ("the Application"). The Application was based primarily upon paragraph 24(1)(a) of the Rules, namely, grounds that NLH considered sufficient to raise a doubt as to the correctness of the Board's decision. The Applicant cited six specific issues in relation to its grounds for review. NLH alleged, in relation to issue 5, new facts which had arisen since the hearing, as provided under paragraph 24(1)(c) of the Rules.

Upon receipt of the Application, the Board sought the views of interested parties on the question of whether a review should be undertaken. Submissions were received from Hydro-Québec, le Procureur général du Québec, Churchill Falls (Labrador) Corporation ("CFL Co") and Ontario Hydro. NLH filed a Reply dated 10 May 1984. The Board is of the view that it was not necessary to hear oral submissions in considering this Application.

THE BOARD'S DECISION AND REASONS FOR DECISION

Section 17(1) of the Act provides that, subject to subsection (2), the Board may review, rescind, change, alter or vary any order or decision made by it or may rehear any application before deciding it. Applications under this section are governed by section 24 of the Rules. The Board has developed certain practices and principles in dealing with applications for review and among these is a recognition that the power to review is a discretionary and unusual power which, in the Board's view, should be exercised sparingly. The onus is always on the Applicant to satisfy the Board that a prima facie case for review exists in the particular circumstances of any case.

After having carefully considered the arguments set out in NLH's Application, the arguments contained in submissions received from parties of record, and the arguments set out in NLH's Reply, the Board has concluded that a sufficient case has not been made to justify a review of its January 1984 Decision. The following are the Board's Reasons for Decision with respect to each of the six specific issues cited by NLH as grounds for review:

Issue 1 - In issue 1 of the Application, NLH submitted that the proper exercise of the Board's discretion pursuant to section 83(a) of the Act requires the Board, prior to issuing an export licence, to ensure that a meaningful attempt has been made by the proposed exporter to work out a satisfactory supply arrangement with a Canadian utility that has a requirement for the energy proposed for export. NLH submitted that the Board did not properly exercise its discretion in this case, but rather that it exercised its discretion in a manner that was inconsistent with the principles followed by the Board in dealing with other applications for the export of energy..

Section 83 of the Act provides that upon an application for a licence, the Board shall have regard to all considerations that appear to it to be relevant and, without limiting the generality of the foregoing, that the Board shall "satisfy itself that the quantity of ... power to be exported does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada ... ". The Act does not set out how the Board must or should satisfy itself in this regard.

The record of the hearing indicates that there was evidence before the Board on the matter of the capacity and capability of the Hydro-Québec system, Hydro-Québec's loads and the excess power and energy available from that system. In determining the amount of power and energy available for export, the Board took into consideration the evidence and representations of NLH and acknowledged that Newfoundland's forecast load might constitute a reasonably foreseeable Canadian requirement that could be supplied by Hydro-Québec (Reasons for Decision, page 30).

In the case of the sale of 111 000 GW.h of interruptible energy under the Energy Contract covered by Licence EL-151, the Board found that even if Newfoundland's possible energy purchases between 1989 and 2003 from Hydro-Québec were subtracted from the amount of excess power and energy, the proposed export would still be surplus to reasonably foreseeable Canadian requirements and, therefore, available for export (Reasons for Decision, pages 30 and 31).

With respect to the interruptible exports under Licences EL-152 and EL-153, the Board, after considering all the evidence before it, satisfied itself that the power and energy proposed for export was surplus to reasonably foreseeable Canadian requirements. These licences contain a condition providing that the exports must be interrupted under certain circumstances to meet Canadian loads and this affords additional protection to Canadian requirements (Reasons for Decision, page 31).

With respect to the short-term firm exports under Licences EL-154 and EL-155, the Reasons for Decision (pages 32 and 33) clearly indicate that in issuing licences for the periods 1984 to 1988 and 1984 to 1992, periods significantly shorter than those requested by

Hydro-Québec, the Board took into consideration the availability of power and the possible requirements of Newfoundland. The Board concluded that licences for the terms authorized would not compromise Newfoundland's position with respect to possible negotiations for supply arrangements with Hydro-Québec in view of the fact that NLH could not be in a position to purchase substantial quantities of firm power and energy from Hydro-Québec until 1989 (Reasons for Decision, pages 32 and 33).

NLH argued that the Board exercised its discretion in an inconsistent manner particularly in the determination of "relevant considerations" within the meaning of section 83 or in the establishment of guidelines as to how the licensing process ought to be administered in the national interest. In this regard, reference was made to the Board's decision on an application by Ocelot Industries Limited for a gas export licence. The Board is of the view that the circumstances surrounding the Ocelot case including the contractual and pricing arrangements can be distinguished from the circumstances surrounding Hydro-Québec's application for licences for the export of electricity. In addition, the Board is not bound by its previous decisions and must, on the basis of the evidence before it, decide each case on its own merits.

For all of the above reasons, the Board is of the opinion that NLH has not made a prima facie case for review on the basis of the arguments raised in respect of issue I.

Issue 2 - The second issue argued by NLH relates to the requirement in certain of the licences that Hydro-Québec offer the power and energy proposed for export to only those utilities that are "directly interconnected", as opposed to those utilities that are "economically accessible", this being a criterion used by the Board in past export licences. NLH argued that this constitutes an error in the interpretation and application of section 83(a) of the Act insofar as the question of due allowance for reasonably foreseeable Canadian requirements is concerned and that the Board erred in its interpretation and application of its previously established policy.

As noted above, section 83(a) of the Act does not specify the manner in which the Board must satisfy itself that the power and energy proposed for export is surplus to reasonably foreseeable Canadian requirements. The Reasons for Decision clearly show that, on the basis of the record of the proceedings, the Board found that for the licence periods granted, the power and energy proposed for export was surplus to reasonably foreseeable Canadian requirements, including the possible loads of Newfoundland. While there is no specific requirement in the Act that a licence contain conditions requiring the offer of power and energy to Canadian utilities prior to export, the Board, pursuant to section 82 of the Act, imposed specific terms and conditions that it deemed appropriate in the circumstances of the present case. Under these terms and conditions, Hydro-Québec is required, prior to export, to offer power and energy to CFL Co, a directly interconnected utility, pursuant to Licences EL-151, EL-154 and EL-155. In addition,

exports could be interrupted by CFL Co under certain conditions pursuant to Licences EL-151, EL-152 and EL-153. The record of the hearing clearly shows that CFL Co would be willing to accommodate the transfer of electricity from the Hydro-Québec system to the NLH system (Transcript volume 10, page 1042). Accordingly, any requirements that NLH might have for the power and energy proposed for export or being exported could be accommodated through CFL Co.

For these reasons and for the reasons set forth in respect of issue 1, the Board is of the opinion that NLH has not made a prima facie case for review on the grounds that the Board erred in its interpretation and application of section 83(a) or that it acted unfairly.

Issue 3 - The third issue relates to the wording of condition 11(b) of Licence EL-151 which provides that the Licensee shall not export energy under the licence whenever and to whatever extent such energy is required to supply any firm load of a Canadian electrical utility directly interconnected with the Licensee's system which lacks generating capacity to meet such firm load. NLH argued that even if it were to become directly interconnected during the term of the licences, its firm load requirements would not receive priority over exports unless the situation were such that it lacked generating capacity to meet such loads.

The purpose of this licence condition is to provide for interruption of exports when a Canadian utility, in an emergency situation, lacks the capacity to meet its own firm loads and must, therefore, purchase from a neighbouring utility. Condition 9(a) of Licence EL-151 is intended to provide an opportunity, in non-emergency situations, for directly interconnected utilities to purchase the power and energy proposed for export. Any requirement that NLH might have for the power and energy proposed for export could be accommodated by the annual offer of such power and energy to CFL Co. Accordingly, the Board is of the view that NLH has not made a prima facie case for review on the basis of the arguments set forth with respect to Issue 3.

Issue 4 - The fourth issue raised by NLH relates to the method used by the Board in assessing the quantities of power and energy to be exported by Hydro-Québec under the Energy Contract (Licence EL-151). In particular, NLH submitted that the Board utilized a total sum calculation of the Applicant's energy availability over the eighteen-year term and disregarded or did not address the extent to which the Applicant may have adequate surpluses during each year of the proposed licence term.

Based on the record of the proceedings and the Reasons for Decision, the Board is of the view that it has complied with the requirements of section 83(a). The record of the proceedings shows that Hydro-Québec filed estimates of monthly surplus power and energy for each year of the proposed licence term as required by the Part VI Regulations. These estimates were used by the Board in preparing the table on a yearly basis shown on Appendix VIII of the

Reasons for Decision. In referring to Appendix VIII, the Board indicated at pages 30 and 31 of its Reasons that it was satisfied that the proposed export of 111 000 GW.h over the period 1984 to 2003 was surplus to reasonably foreseeable Canadian requirements, including the possible requirements of Newfoundland. The possible requirements of Newfoundland were based on the evidence provided by NLH.

In addition to considering the total amount of surplus that would be available for export over the proposed licence term, the Board considered the amount of power and energy that would be surplus on an annual basis, as indicated by the figures in Appendix VIII. While these figures, taking into account the possible requirements of Newfoundland, do not demonstrate on their face that the annual amount of up to 11 000 GW.h would be available in each year commencing 1997, it should be noted that:

- (a) By condition 9 of Licence EL-151, Hydro-Québec is required, before offering the Contract Energy to the Power Authority of the State of New York, to offer for sale the energy proposed for export for the coming Contract Year to each Canadian electrical utility directly interconnected with the Hydro-Québec system. The Board imposed this condition to provide additional protection for Canadian requirements in each and every year of the licence term;
- (b) the evidence indicated that it was expected that the full target amount of 111 000 GW.h would be delivered by 1997, and
- (c) the Board noted in its Reasons for Decision on pages 29 and 31 that additional energy would normally be available to Hydro-Québec over and above the amounts included in the excess figures shown in Appendix VIII, so additional amounts of energy would be available for storage and could also be used to satisfy additional markets if they were to develop.

On the basis of the foregoing, the Board is of the opinion that NLH has not made a prima facie case for review on the basis of the arguments raised in issue 4.

Issue 5 - The fifth issue raised by NLH refers to the decision of the Board to issue licences to Hydro-Québec for the export of firm power and energy (Licences EL-154 and EL-155) in the absence of any signed contracts. NLH maintained that the Board's power to issue licences is subject to the Regulations and it pointed out that section 6(2)(g) of the Part VI Regulations requires an Applicant for an export licence to provide a copy of contracts covering the proposed exportation of power as part of its application. NLH contended that the Board erred in law in granting the requested licences, that Hydro-Québec's request for such licences was founded upon a desire to circumvent the specific requirements of the Act for the licensing of energy exports from Canada, and that the Board should consider such requests only upon an application in respect of a specific export as intended by the Act. In setting forth its

arguments with respect to this issue, NLH referred to what it considered to be a "new fact", namely a statement by Hydro-Québec, in a separate application for licences to export power and energy to the New England Power Pool, to the effect that Hydro-Québec is seeking a master licence similar to Licences EL-154 and EL-155 so that it will not be necessary for it to be subject to public hearings for the acquisition of export licences.

There is no specific requirement in section 83 of the Act that the Board, in considering an export licence, have before it signed contracts for the proposed exports. The Part VI Regulations referred to by NLH stipulate that the Applicant shall provide the information set out in the Schedule unless otherwise authorized by the Board. While the Board did not specifically require Hydro-Québec to provide written contracts for these proposed exports, the record of the proceedings indicates that there was evidence before the Board to demonstrate that the power and energy proposed for export under the licences in question was surplus to reasonably foreseeable Canadian requirements, evidence respecting the market for the proposed power and energy, evidence with respect to the type of contract which might be entered into under any licence which might be granted for the export of short-term firm power and energy, the possible term of such contracts, and the minimum price which would be charged for any power and energy exported under these licences. On the basis of this evidence, the Board satisfied itself that the requirements of section 83 of the Act had been met and indicated that it was prepared to issue two licences. The licences authorize the export of power and energy only until 1988 and 1992, terms significantly less than those requested by Hydro-Québec.

Licences EL-154 and EL-155 contain conditions requiring that individual blocks of power and energy proposed for export be offered to directly interconnected Canadian utilities prior to being committed for export and that proposed export contracts be submitted to the Board for approval (condition 9 of Licence EL-154 and condition 7 of Licence EL-155). The requirement of a prior offer will ensure that Canadian utilities are aware of proposed export contracts and have an opportunity to purchase the power if desired. The requirement that proposed export agreements be submitted for approval was intended as a mechanism whereby the Board could ensure that any future contracts do, in fact, meet the criteria employed by the Board in satisfying itself that the licences should be issued. It would, of course, be open to interested parties to raise concerns they might have in respect of any specific contract, and the Board would consider these in the manner deemed appropriate in the circumstances. This might include a public hearing to examine the proposed contract in the context of the licence conditions imposed by the Board.

The Board is of the view that NLH has not made a prima facie case for review on the basis of the arguments set forth with respect to issue 5.

Issue 6 - This issue relates to the argument that insufficient allowance has been made for Canadian requirements in that certain of the conditions of Licences EL-154, EL-155, and EL-151 allow Canadian utilities only fifteen days to assess whether they would be interested in the power and energy proposed for export. In addition, NLH maintained that under Licence EL-151 Canadian utilities are not given the opportunity to acquire all or any portion of the energy for longer periods than those proposed in the Energy Contract and that, therefore, this is another instance where due allowance has not been made for future Canadian requirements.

The 15-day period referred to in the licences was derived from a procedure suggested by Ontario Hydro, a utility well experienced in interprovincial electrical transactions, and accepted by Hydro-Québec with respect to energy intended for export under the Energy Contract. The record of the proceedings indicates that this procedure was discussed at the hearing in relation to the Energy Contract.

In issuing the licences in question, the Board was satisfied that the power and energy proposed for export under each of the licences was surplus to reasonably foreseeable Canadian requirements. As pointed out in the Board's Reasons for Decision on issue 1, there is no requirement in the Act that the power and energy be offered to anyone prior to export. In the circumstances of this case, however, the Board was of the view that such an offer would provide additional protection for Canadian requirements. The purpose of the 15-day procedure was to ensure that utilities would respond to offers in a timely fashion. There is nothing in the licences that would prevent a party receiving an offer from requesting additional time to consider such an offer. For the foregoing reasons and for the reasons given with respect to issue 1, the Board, therefore, is of the opinion that NLH has not made a prima facie case for review on the basis of the arguments set forth in issue 6.

OTHER ISSUES:

In addition to the six issues raised as grounds for review, NLH also raises two other related matters in its Application and Reply.

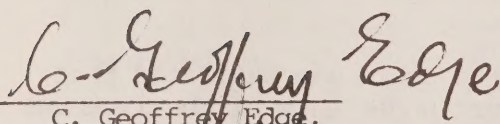
The first relates to the fact that there are concurrent proceedings in the Federal Court relating to certain of the issues raised in the Application for Review. Hydro-Québec contended in its submission that the Board should not consider the Application for Review until proceedings in the Federal Court of Appeal have been exhausted. NLH submitted that the Act contemplates the concurrent availability of these remedies and that the Board is initially the most appropriate forum in which an interested party ought to seek relief from a decision. The Board agrees with the position taken by NLH on this matter.

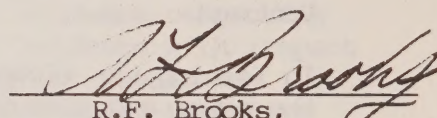
The other issue relates to the availability of the remedies sought by NLH. Certain of the requested orders relate clearly to variations pursuant to section 17. There is, however, a question

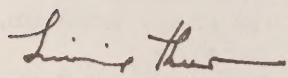
as to whether the Board has the jurisdiction to rescind its decision to issue licences in the manner requested by NLH in view of the fact that the licences have been approved by the Governor in Council. In light of the Board's decision on NLH's application, it is not necessary to deal with this issue.

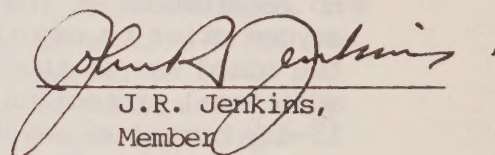
CONCLUSION

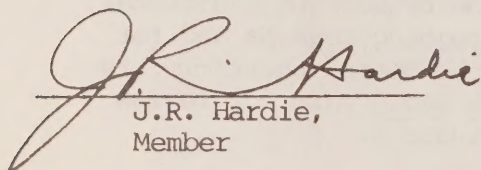
For the reasons stated in the previous sections, the Board is of the opinion that NLH has not made a prima facie case for review of the January 1984 decision authorizing the export of power and energy by Hydro Québec. Accordingly, the Application is dismissed.

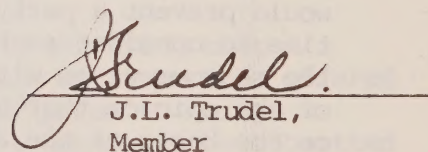

C. Geoffrey Edge,
Chairman

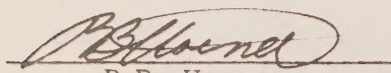

R.F. Brooks,
Vice-Chairman

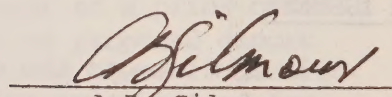

L.M. Thur,
Associate Vice-Chairman

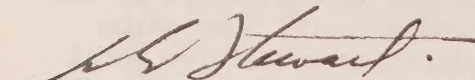

J.R. Jenkins,
Member


J.R. Hardie,
Member


J.L. Trudel,
Member


R.B. Horner,
Member


A.B. Gilmour,
Member


W.G. Stewart,
Member

NOTE: Prior to joining the Board, Mr. A.D. Hunt was a Director of the Lower Churchill Development Corporation, in which NLH holds a 51% equity interest. Because of that previous involvement, Mr. Hunt, Associate Vice-Chairman of the Board, did not participate in consideration of this Application.

Mr. J. Farmer, Associate Vice-Chairman, was absent from Ottawa when this matter was before the Board.

